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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1958

No. 712

DULUTH SOUTH SHORE & ATLANTIC RAILROAD COMPANY,
a Minnesota corporation,
Petitioner-Appellant,

vs.

MICHIGAN CORPORATION & SECURITIES COMMISSION and
MICHIGAN CORPORATION TAX APPEAL BOARD,
Defendants-Appellees.

On Appeal from the Supreme Court of the State of Michigan

MOTION TO DISMISS

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SPEAKER-HINES AND THOMAS, INC., LANSING, MICH.—1959

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MOTION TO DISMISS[*]

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the appeal of appellant from the judgment of the Supreme

[*]
Numbers in parentheses will refer to pages of the Jurisdictional Statement, unless otherwise indicated.

Court of Michigan, entered September 10, 1958, be dismissed on the grounds that (1) the question presented is so unsubstantial as to warrant no further argument, (2) the appellant has not properly raised any federal question, and (3) the judgment of the Supreme Court of Michigan is conclusive.

OPINIONS BELOW

Citations to the opinions below are correctly set forth in the Jurisdictional Statement (1-2). The question appellant seeks to have reviewed is considered on pp 652-665 of Volume 353 of the Official Michigan Reports, and is reproduced in the Jurisdictional Statement on pp 56a-69a. The applicable portion of the opinion of the Corporation Tax Appeal Board, affirmed, is reproduced on pp 36a-41a of the Jurisdictional Statement.

JURISDICTION

Appellant attempts to invoke jurisdiction of this Court under 28 U.S.C.A. § 1257(2). For the reasons set forth herein the appeal should be dismissed.

STATUTES INVOLVED

The pertinent provisions of the Michigan statutes in point are set forth in the Jurisdictional Statement on pp 85a-88a.

QUESTIONS PRESENTED

If any federal question has been properly raised and presented, the Jurisdictional Statement does not accu-

rately state such question. We restate what appellees believe to be the only possible federal question raised:

> "Can the net ton miles of freight transported in interstate and foreign commerce by petitioner and appellant (a railroad) in the State of Michigan be considered and used together with other factors for the purpose of measuring the portion of such railroad's capital and surplus that is taxable by the State of Michigan for purposes of the annual franchise tax?"[1]

[The word "taxable", as used in this statement, refers to that portion of the total paid-up capital and surplus of appellant that would be attributable to Michigan for the purpose of determining the amount of appellant's total paid-up capital and surplus for franchise fee computation purposes. The privilege fee in question is measured by the application of a 4-mill rate to the allocated or apportioned part of total paid-up capital and surplus attributable to Michigan by use of an apportionment formula.]

In addition, appellees, by their Motion to Dismiss, raise the following issues: (1) the question presented is so unsubstantial as to not warrant further argument, (2) the appellant has not properly raised any federal question, and (3) the judgment of the Supreme Court of Michigan is conclusive.

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[1]

This statement of the question is taken from the "Statement of Questions Involved", as it appears on p (i) of appellant's brief in the Supreme Court of Michigan, and quoted by the Supreme Court of Michigan in its opinion [163-a); 353 Mich 636 at p 660].

STATEMENT OF THE CASE

Appellees agree to the accuracy of the facts in the appellant's statement of the case (5-9), except they do not agree with the statement on p 5 concerning when apportionment or allocation formulae are to be employed. No reference is made in the statute [Act No. 85, Public Acts of 1921, as amended (CL '48 §§ 450.301 et seq., 1954 Sup.; M.S.A §§ 21.201 et seq., Cum. Sup.)], to "interstate commerce". Section 5 of the statute, [CL '48 § 450.305, 1954 Sup.; M.S.A. § 21.208 Cum. Sup.] as quoted on pp 87a-88a of the Jurisdictional Statement, indicates that the entire paid-up capital and surplus of any corporation is included in the measure of the annual corporation privilege fee, if the corporation does not maintain a regular place of business outside the State of Michigan, other than a statutory office. If it does, then a formula is used.

In addition to the facts referred to by appellant, it is believed that the following facts and conclusions reached by the Supreme Court of Michigan are relevant. We quote from that opinion [(60a-61a); 353 Mich 636, pp 657-658]:

> "(1) The appellant is a railroad corporation which has most of its trackage and other physical facilities located in Michigan and hence makes year-round use of the services and protection of this State;
>
> "(2) The appellant's business is principally interstate commerce, but it also engages in substantial intrastate commerce in Michigan;
>
> "(3) As to the commerce-clause argument advanced by appellant, no claim is advanced that the $38,969

tax is unreasonable and this record amply supports a contrary finding of fact of the Michigan corporation tax appeal board;

"(4) The tax is levied upon all business organized for profit and doing business within the State of Michigan and is plainly nondiscriminatory as to this taxpayer;

"(5) The tax is *not* levied upon any part of the interstate commerce of the appellant or any direct product thereof, but upon appellant's privilege of doing business within Michigan."

Appellees believe that the following construction of the privilege fee statute in question, by the Michigan Supreme Court, is material. We quote from p 67a of the Jurisdictional Statement:

"We construe the formula in section 5b as having as its purpose the ascertaining of a fair proportion of appellant's paid-up capital and surplus allocable to Michigan for purpose of taxing appellant's right to carry on its intra state business." [353 Mich 636, p 663]

The following factual references and determination of the Corporation Tax Appeal Board are also deemed relevant:

"• • • The members of the Appeal Board believe that to reduce the ratio in Michigan of appellant's net ton miles of revenue freight from approximately 78-½% to 9% (appellant's contention) completely distorts the freight business of appellant in Mich-

igan. Appellee's Exhibit 8 shows on Schedule 28 the following information:

	System	Michigan
Tons-Revenue freight	3,822,179	3,796,930
Freight locomotive miles	1,117,461	939,325
Freight revenue	$7,480,245	$6,327,474
Tons of freight on Line-Originated	1,926,388	1,902,194
Tons of freight on Line-Terminated	704,394	675,696

"We conclude that the factor of a net ton miles or (of) revenue freight as used by the appellee Commission does not unreasonably burden interstate commerce nor unlawfully deprive appellant of its property without due process of law." (40a-41a)[2]

Tons-Revenue freight	99.33%
Freight locomotive miles	84.06%
Freight Revenue	84.59%
Tons of freight on Line-Originated	98.74%
Tons of freight on Line-Terminated	95.93%

The above factors combined show that 92.53 per cent of appellant's activity, as measured by such factors, took place within Michigan.

On the basis of these facts appellant seeks to invoke the jurisdiction of this Court to review the decision of the Supreme Court of Michigan [reported in 353 Mich 636], to the extent that it held valid, against the interstate-commerce objections of appellant, an apportionment formula employed in the Michigan franchise fee statute to arrive at that portion of the total paid-up capital and surplus of appellant which would be attributable to Michigan for Michigan franchise privilege fee purposes.

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[2]

From the above table it is to be found that the following percentages of business were done in Michigan:

The applicable formula (4, 88a) employs the equally-weighted factors of net ton miles of freight and miles of track. Thus, since 78.61% of appellant's total net miles of freight everywhere and 81.18% of its miles of track everywhere were within Michigan, the formula apportioned 79.89% [81.18% + 78.61% ÷ 2 = 79.89%] of appellant's total paid-up capital and surplus to Michigan for franchise fee measurement purposes. Therefore, the only question sought to be raised by appellant is the proper *measure* of a franchise fee imposed on appellant for the privilege of doing an *intrastate business* in Michigan as a foreign corporation.

Appellant urges that proper apportionment should be 45.09% of its total paid-up capital and surplus for this purpose, instead of the 79.89% (7). It urges that this is necessary (1) because the tax, as measured by the § 5b formula, is imposed on the privilege of engaging in interstate commerce, and (2) because of the relationship of the factor "net ton miles" to interstate commerce (11-15). It concedes that the use of other apportionment factors, such as total tangible property, could have been properly used, even though the use of such factors would give the same result (15).

In contrast to these contentions of the appellant, the Supreme Court of Michigan concluded, as follows:

> "We find no United States supreme court precedent which interprets the commerce clause as forbidding use of such an allocation formula (the § 5b formula) unless the result is shown to be unreasonable or discriminatory." [(69a); 353 Mich 636, p 665]

REASONS FOR GRANTING THE MOTION TO DISMISS

1. A substantial federal question is not presented.

The appellant urges that there is a substantial federal question involved because the annual corporate privilege fee in question is a tax imposed on the privilege of engaging in interstate commerce (11), and invalidly uses in its measure "certain elements of the interstate process" (15). It then concludes that cases forbidding the imposition of a tax on the privilege of doing interstate commerce[3] are applicable, as are the cases that prohibit a state from taxing gross receipts derived from such commerce.[4]

Contrary to appellant's argument, it has been clearly established by many decisions of the Supreme Court of Michigan (which are amply supported by the specific statutory language) that the annual franchise fee in question is one imposed upon foreign corporations for the privilege of being qualified to do business within the State of Michigan. Section 4 of the statute[5] specifically provides:

> "Every • • • profit corporation organized or doing business under the laws of this state, or having the privilege to do business, employing capital or persons, owning or managing property or maintain-

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[3]

Appellant cites Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 US 157; Railway Express Agency, Inc. v. Virginia, 347 US 359; and Spector Motor Service, Inc. v. O'Connor, 340 US 602.

[4]

Appellant cites Cooney v. Mt. States Tel. & Tele. Co., 294 US 384.

[5]

CL '48, § 450.304, 1954 Sup.; M.S.A. § 21.205 Cum. Sup.

ing an office, or engaging in any transaction, in this state, (with noted exceptions) * * * shall pay, at the time of filing the annual report with the Michigan corporation and securities commission, * * * an annual fee of 4 mills upon each dollar of its paid-up capital and surplus, * * *. It is the intent of this section to impose the tax herein provided for upon every corporation, foreign or domestic, having the privilege of exercising corporate franchises within this state * * *." (85a-86a)[6]

The Supreme Court of Michigan, in the opinion below, characterized the tax in question as follows:

"The tax complained of has been interpreted by this Court as a franchise tax imposed upon the right to do intrastate business — with that privilege measured by the amount of paid-up capital and surplus reasonably allocable to Michigan.

* * *

"Mr. Justice Smith, in a recent decision of this Court interpreting the same tax (albeit a different allocation formula), held:

"'We are taxing the privilege of carrying on intrastate activities. * * * We are taxing the value of the exercise of a privilege in this State and we ascertain that value through the application of prop-

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[6]

Cf § 5e (CL '48 § 450.305e, 1954 Sup.; M.S.A. § 21.208(5) Cum. Sup.) which provides for adjustment of the statutory formulae if "an allocation factor does not properly reflect the activity, business, receipts and capital of a taxpayer reasonably attributable to the state," cited by the Court below in 353 Mich 636, at pp 659-660 in connection with its construction of the statute.

erty, payroll, and sales factors to the fair average stock value or the paid-up capital and surplus.' *Cleveland-Cliffs Iron Co.* v. *Corporation & Securities Commission*, 351 Mich 652, 682." [(61a-62a); 353 Mich 636, pp 658-659]

To the same effect, see also

In re Detroit & Windsor Ferry Co., 232 Mich 574;

In re Truscon Steel Company, 246 Mich 174;

In re Detroit Properties Corporation, 254 Mich 523;

In re Detroit International Bridge Co., 257 Mich 52, Aff'd by

Detroit International Bridge Co. v. *Corporation Tax Appeal Board of Michigan*, 287 US 295;

Udylite Corporation v. *Corporation & Securities Commission*, 319 Mich 1; and

Chicago, Duluth & Georgian Bay Transit Company v. *Corporation & Securities Commission*, 319 Mich 14.

It is, therefore, apparent that the Michigan statute in question cannot be considered as one imposed upon interstate commerce or business.

The "substantial" question that appellant seeks to raise relates solely to the *measure* of a local intrastate corporate privilege fee. Appellant urges that the fee in question is invalidly determined because the § 5b apportionment formula takes into consideration, in its measurement, integral elements of its interstate business. More specifically, it urges that the net-ton-miles factor must be adjusted by excluding all interstate ton-miles from the

Michigan portion of the factor. It does not contend that an unreasonable result flows from leaving such tonnages in the Michigan portion of the factor.

Appellant's argument is novel and unsupported by any decision of this Court. It is expressly contrary to a long and well-established line of decisions of this Court upholding apportionment formulae used to measure a state's privilege fees or taxes which include in the measure the interstate aspects of a multi-state business.

As stated in

> *Home Insurance Company* v. *New York* 134 US 594, 600;
>
> "The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows."

Thus, historically, formulae comparable to the one in question have been upheld in measuring local privilege fees of railroads. Based upon the authority and precedent of

> *State Tax on Railway Gross Receipts*, 15 Wall 284,

the Court in

> *Maine* v. *Grand Trunk Railway Company*, 142 US 217 (1891)

upheld a statute of Maine based upon that portion of the railroad's gross receipts which track mileage in Maine bore to total track mileage. This Court in such case reasoned that the State of Maine had the power to impose a tax on the privilege of the Grand Trunk Railway to exercise its corporate franchise within the state. Thus, the question for decision was "what may be justly exacted for the privilege". The Court concluded that the

> "* * * rule of apportioning the charge to the receipts of the business would seem to be eminently reasonable, and likely to produce the most satisfactory results, both to the State and to the corporation taxed." [142 US 217, 288]

Maine v. *Grand Trunk Railway Company, supra,* is significant because of the Court's assertion that the receipts were simply used to ascertain the value of the privilege conferred and were not subject to tax.

This Court has consistently held that state income, excise or privilege taxes may be properly measured by the total business done within the state, whether denoted interstate, intrastate, or foreign in character.

Baltic Mining Co. v. *Massachusetts,* 231 US 68;

Butler Bros. v. *McColgan,* 315 US 501;

International Shoe Co. v. *Shartel,* 279 US 429;

Ford Motor Car Co. v. *Beauchamp,* 308 US 331;

Hump Hairpin Co. v. *Emmerson,* 258 US 290;

International Harvester Co. v. *Evatt,* 329 US 416;

Matson Navigation Co. et al v. *State Board of Equalization,* 297 US 441;

Spector Motor Service, Inc. v. *O'Connor, supra*, 340 US 602;

Underwood Typewriter Co. v. *Chamberlain*, 254 US 113;

U. S. Glue Co. v. *Oak Creek*, 247 US 321;

Western Cartridge Co. v. *Emmerson*, 281 US 511; and

Western Live Stock v. *Bureau*, 303 US 250

As stated by this Court in:

Baltic Mining Co. v. *Massachusetts, supra*, 231 US 68, at p 83:

"* * * A resort to the receipts of property or capital employed in part at least in interstate commerce, when such receipts or capital are not taxed as such but are taken as a mere measure of a tax of lawful authority within the State, has been sustained. * * *"

Hump Hairpin Co. v. *Emmerson, supra*, 258 US 290, at p 294:

"* * * taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund (not wholly derived from such commerce) to be assessed, that the principle of the cases so holding must be regarded as a settled exception to the general rule * * *"

International Harvester Co. v. *Evatt, supra*, 329 US 416, at p 421:

"• • • Nor does the fact that a computation such as that under Ohio's law includes receipts from interstate sales affect the validity of a fair apportionment.• • •"

Spector Motor Service, Inc. v. *O'Connor, supra,* 340 US 602, at pp 609-610:

"Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate. *Interstate Pipe Line Co.* v. *Stone,* 337 US 662; *International Harvester Co.* v. *Evatt,* 329 U.S. 416; *Atlantic Lumber Co.* v. *Comm'r of Corporations and Taxation,* 298 U.S. 553. The same is true where the taxpayer's business activity is local in nature, such as the transportation of passengers between points within the same state, although including interstate travel, *Central Greyhound Lines* v. *Mealey,* 334 U.S. 653, or the publication of a newspaper, *Western Live Stock* v. *Bureau of Revenue,* 303 U.S. 250. See also *Memphis Gas Co.* v. *Stone,* 335 U.S. 80."

This being the status of the law, the appellant has raised no substantial federal question.

2. Appellant has not properly raised any federal question.

In reference to questions pertaining to the proper measure of a state's fees or taxes, this Court has also consistently taken the position that the burden was upon the taxpayer to show that any particular formula had

the effect of taxing or attributing to the taxable state extraterritorial values or events.

Hans Rees' Sons, Inc. v. *North Carolina, ex rel.*, 283 US 123;

Butler Bros. v. *McColgan, supra*, 315 US 501; and

International Harvester Co. v. *Evatt, supra*, 329 US 416.

As stated in *Butler Bros.* v. *McColgan, supra*, at p 507:

> "One who attacks a formula of apportionment carries a distinct burden of showing by 'clear and cogent evidence' that it results in extraterritorial values being taxed, * * *"

Or, as stated in *International Harvester Co.* v. *Evatt, supra*, 329 US 416, at p 423:

> "* * * Unless a palpably disproportionate result comes from an apportionment, a result which makes it patent that the tax is levied upon interstate commerce rather than upon an intrastate privilege, this Court has not been willing to nullify honest state efforts to make apportionments * * *."

Thus, it is evident that before appellant is in a position to raise a substantial federal question in regard to the validity of the apportionment formula in question, it must have urged and been able to substantiate, "by clear and cogent evidence", that the formula in question did not reasonably measure its business done within Michigan. Basically, it is a due process question.

Hans Ree's Sons, Inc. v. *North Carolina, ex rel., supra*, 283 US 123;

Compania General v. *Collector of Internal Revenue*, 279 US 306;

Equitable Life Assurance Society v. *Pennsylvania*, 238 US 143; and

Connecticut General Life Ins. Co. v. *Johnson*, 303 US 77.

Nowhere, in the proceedings below or in its Jurisdictional Statement, has appellant urged that the formula in question unreasonably attributes to Michigan a disproportionate part of its total business.

The appellant, therefore, has not properly preserved, pursued or raised in its proceedings in this cause the federal question that it claims should now be reviewed by this Court.

3. The judgment of the Supreme Court of Michigan is conclusive in the premises.

Even though the factual question in regard to the reasonableness of the measure of the fee in question had not been properly raised by the appellant, the Corporation Tax Appeal Board below (40a-41a) and the Supreme Court of Michigan below (61a) specifically found, as a matter of fact, that the formula in question, as applied to appellant, did not unreasonably measure the privileges granted by Michigan and that the appellant was entitled to no relief. As stated in the opinion of the Michigan Supreme Court quoted above:

> "(3) As to the commerce-clause argument advanced by appellant, no claim is advanced that the $38,969 tax is unreasonable and this record amply supports a contrary finding of fact of the Michigan corpora

tion tax appeal board;" [(61a); 353 Mich 636, at p 658]

In the absence of the appellant's raising any factual question to the contrary and in the absence of the appellant's offering any evidence in support of a contrary factual conclusion, the decision of the Supreme Court of Michigan is now conclusive.

CONCLUSION

It is believed that the reasons herein advanced in support of this motion have been recently considered with favor by this Court in

Railway Express Agency, Inc. v. *Virginia*, No. 38, Oct. Term, 1958, U S Sup Ct, Decided Feb. 24, 1959.

It was there held that the State of Virginia could include within the value of a local tax measure the total of all values reasonably attributable to the State, regardless of whether denoted intra- or inter-state in character. The Court further concluded that the question of the measure of the tax was not properly before the Court, because:

"• • • it is necessary that appellant make an affirmative showing that the mileage method used by Virginia is so palpably unreasonable that it violates due process. This it has failed to do. • • •"[7]

The Court then continued:

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[7]

As indicated on p 7, appellant's Michigan miles of track is 81.18% of its total, while the formula in question attributed 79.89% of appellant's total paid-up capital and surplus to Michigan.

"• • • Even where taxpayers have attempted to show through evidence, as this appellant has not, that a given apportionment formula effected an appropriation of more than that to which the State was entitled, this Court has required '"clear and cogent evidence" that it results in extraterritorial values being taxed.' • • •"[8]

These same conclusions were impliedly involved in the cases of:

Northwestern States Portland Cement Co. v. *State of Minnesota*, No. 12, Oct. Term, 1958, U S Sup Ct, Decided Feb. 24, 1959, and

T. V. Williams, as State Revenue Commissioner, v. *Stockham Valves and Fittings, Inc.*, No. 33, Oct. Term 1958, U S Sup Ct, Decided Feb. 24, 1959.

It is, therefore, respectfully submitted that the appeal should be dismissed.

Respectfully submitted,

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[8]

In support of this statement are cited: Butler Bros. v. McColgan, supra, 315 US 501, 507 (1942); Norfolk & Western R. Co. v. North Carolina, 297 US 682, 688 (1936); Bass, Ratcliff & Gretton v. State Tax Commission, 266 US 271, 282-284 (1924); and Nashville, C. & St. L. R. v. Browning, 310 US 362, 365-366 (1940).